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W.A.No. 620/2021

THE HIGH COURT OF MADHYA PRADESH, INDORE BENCH

DIVISION BENCH

Writ Appeal No. 620 of 2021

Dr.Durgesh Rathi

vs.

State of Madhya Pradesh and another

Coram : Hon'ble Shri Justice Subodh Abhyankar
Hon'ble Shri Justice Satyendra Kumar Singh

Shri L.C. Patne, learned counsel for the appellant.

Shri Aditya Garg, learned Government Advocate for the
respondent/State.

Whether approved for reporting : Yes

JUDGMENT

(Delivered on 23 / 03 / 2022)

Per: Subodh Abhyankar, J.

1. This Writ Appeal has been preferred under Section 2(1) of the Madhya Pradesh Uchcha Nyalaya (Khand Nyayapeeth Ko Appeal) Adhiniyam, 2005, against the order dated 8.7.2021 passed by the learned Judge of the Writ Court in Writ Petition No.13815/2020.

2. The case of the appellant/petitioner before the writ court was that the petitioner was appointed on the post of Insurance Medical Officer by order dated 15.05.1989. Vide order dated 12.09.1992 he was confirmed into the service. After rendering 30 years of qualifying service, he submitted his application on 12.12.2019, seeking voluntary retirement from service, in a prescribed format i.e. Form-28 under Rule 42(1)(a) of the M.P Civil Services (Pension) Rules, 1976 (for short 'the Rules of 1976'). The application was forwarded by the

Director, E.S.I.C. to the Secretary, Labour Department with the endorsement that no show cause notice/disciplinary proceedings or recovery are pending against the petitioner. The period of notice expired on 29.02.2020, but by that time the Government had imposed **Essential Services Management Act, 1968** (hereinafter referred as ESMA) Covid-19 in the State. Vide letter dated 27.07.2020, hence the petitioner sent a reminder to the Secretary and requested for issuance of necessary orders, and vide impugned the order dated 09.09.2020, the State Government has rejected the applications of the petitioner and 4 other doctors due to applicability of ESMA Covid-19 in the State. Being aggrieved, the petitioner preferred W.P.No.13815/2020 which was dismissed by the learned judge of the writ court vide its order dated 08.07.2021. Hence this Writ Appeal.

3. Shri L.C. Patne, learned counsel for the appellant has submitted that the contention of the petitioner that as per Sub-rule (1) of Rule 42 of the Rules of 1976, after serving a prior notice of more than 2 months, in the absence of any departmental enquiry as contemplated under Proviso to Sub-rule (1), it has to be deemed that the appointing authority has allowed to such Government servant to retire from service on the date after expiry of the period of Notice did not find favour by the writ court by placing reliance on a decision rendered by the Supreme Court in the case of State of Uttar Pradesh & others vs. Achal Singh reported as (2018) 17 SCC 578. It is submitted by shri Patne that while drawing parity of the case of the petitioner with that of a decision rendered by the Supreme Court in the case of Achal Singh

(supra), the learned Judge of the writ court, although quoted Rule 56 of the Fundamental Rules as amended in the State of U.P., but did not take note of the explanation attached to the aforesaid Rule which is the distinguishing feature as has also been rendered in para 12 of **Achal Singh's (supra)** case. It is submitted that **Achal Singh's (supra)** would not be applicable to the petitioner's case in the light of the Rule 42 of the Rules of 1976 which is different from Fundamental Rule (FR)-56 as amended in the State of Uttar Pradesh. Shri Patne has also relied upon a decision rendered by the Division Bench of this court in the case of **Dr. Duresh Rathi vs. State of Madhya Pradesh & others** (W.A.No.247 of 2021 dated 17.6.2021) to submit that deeming clause would be applicable in the case on hand as well.

4. Counsel for the State on the other hand has opposed the prayer and supported the impugned order.

5. Heard the counsel for the parties and perused the record.

6. On perusal of the record, *prima facie* it is found that the learned Judge has quoted Rule 56 -A of the Fundamental Rules as amended in the State of U.P. Vis-a-vis Rule 46 of the Rules of 1976 but has not referred to the explanation appended to the Fundamental Rule 56 as amended in U.P., which has been dealt with by the Supreme Court in para 11 of **Achal Singh's (supra)** case. On careful scrutiny of the impugned order passed by the writ court and the submissions as advanced by Shri Patne, this court is of the considered opinion that the learned judge of the writ court erred in holding that the provisions of Rule 56 -A of the Fundamental Rules as amended in the State of U.P.

are *in pari materia* with the Rule 46 of the Rules of 1976. The relevant paras of *Achal Singh* (supra) read as under:-

“8. In order to appreciate the rival submissions, it is necessary to consider the Fundamental Rules as amended in the State of Uttar Pradesh. The same is somewhat different from the rules framed in other States. Rule 56 of the Fundamental Rules as amended in the State of Uttar Pradesh, is extracted hereunder:

“**56. (a)** Except as otherwise provided in this Rule, every government servant other than a government servant in inferior service shall retire from service on the afternoon of the last day of the month in which he attains the age of fifty-eight years. He may be retained in service after the date of compulsory retirement with the sanction of the Government on public grounds which must be recorded in writing, but he must not be retained after the age of 60 years except in very special circumstances.

(b) A government servant in inferior service shall retire from service on the afternoon of the last day of the month in which he attains the age of sixty years. He must not be retained in service after that date, except in very special circumstances and with sanction of the Government.

(c) Notwithstanding anything contained in clause (a) or clause (b), the appointing authority may, at any time by notice to any government servant (whether permanent or temporary), without assigning any reason, require him to retire after he attains the age of fifty years or such government servant may by notice to the appointing authority voluntarily retire at any time after attaining the age of forty-five years or after he has completed qualifying service of twenty years.

(d) the period of such notice shall be three months:

Provided that—

(i) any such government servant may by order of the appointing authority, without such notice or by a shorter notice, be retired forthwith at any time after attaining the age of fifty years, and on such retirement the government servant shall be entitled to claim a sum equivalent to the amount of his pay plus allowances, if any, for the period of the notice, or as the case may be, for the period by which such notice falls short of three months, at the same rates at which he was drawing immediately before his retirement;

(ii) it shall be open to the appointing authority to allow a government servant to retire without any notice or by a shorter notice without requiring the government servant to pay any penalty in lieu of notice:

Provided further that such notice given by the government servant against whom a disciplinary proceeding is pending or contemplated, shall be effective only if it is accepted by the appointing authority, provided that in the case of a contemplated disciplinary proceeding the government servant shall be informed before the expiry of his notice that it has not been accepted:

Provided also that the notice once given by a government servant under clause (c) seeking voluntary retirement shall not be withdrawn by him except with the permission of the

appointing authority.

(e) A retiring pension shall be payable and other retirement benefits, if any, shall be available in accordance with and subject to the provisions of the relevant Rules to every government servant who retires or is required or allowed to retire under this rule.

Provided that where a government servant who voluntarily retires or is allowed voluntarily to retire under this rule the appointing authority may allow him, for the purposes of pension and gratuity, if any, the benefit of additional ⁵⁸⁷ service of five years or of such period as he would have served if he had continued till the ordinary date of his superannuation, whichever be less;

Explanation.—(1) The decision of the appointing authority under clause (c) to require the government servant to retire as specified therein shall be taken if it appears to the said authority to be in public interest, but nothing herein contained shall be construed to require any recital, in the order, of such decision having been taken in the public interest.

(2) In order to be satisfied whether it will be in the public interest to require a government servant to retire under clause (c), the appointing authority may take into consideration any material relating to the government servant and nothing herein contained shall be construed to exclude from consideration—

(a) any entries relating to any period before such government servant was allowed to cross any efficiency bar or before he was promoted to any post in an officiating or substantive capacity or on an ad hoc basis; or

(b) any entry against which a representation is pending, provided that the representation is also taken into consideration along with the entry; or

(c) any report of the Vigilance Establishment constituted under the Uttar Pradesh Vigilance Establishment Act, 1965.

(2-A) Every such decision shall be deemed to have been taken in the public interest.

(3) The expression “appointing authority” means the authority which for the time being has the power to make substantive appointments to the post or service from which the government servant is required or wants to retire; and the expression “qualifying service” shall have the same meaning as in the relevant rules relating to retiring pension.

(4) Every order of the appointing authority requiring a government servant to retire forthwith under the first proviso to clause (d) of this rule shall have effect from the afternoon of the date of its issue, provided that if after the date of its issue, the government servant concerned, bona fide and in ignorance of that order, performs the duties of his office his acts shall be deemed to be valid notwithstanding the fact of his having earlier retired.”

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11. The Explanation attached to Rule 56 makes it clear that the decision of the appointing authority under clause (c) of Rule 56 to retire a government servant shall be taken if it appears to be in public interest. The Explanation is applicable to both the exigencies viz. when the Government retires an employee or when an employee seeks voluntary retirement, not only when

Government desires to retire an employee in public interest. The Explanation attached to Rule 56 as applicable in the State of Uttar Pradesh is clear and precise.

12. In our opinion, whether voluntary retirement is automatic or an order is required to be passed would depend upon the phraseology used in a particular rule under which retirement is to be ordered or voluntary retirement is sought. The factual position of each and every case has to be seen along with applicable rules while applying a dictum of the Court interpreting any other rule it should be in pari materia. Rule 56(2) deals with the satisfaction of the Government to require a government servant to retire in the public interest. For the purpose, the Government may consider any material relating to government servant and may requisition any report from the Vigilance establishment.”

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42. There are several decisions of the High Court, namely, *Anil Dewan v. State*; *State of Punjab v. Harbir Singh Dhillon* and *Kalpna Singh v. State of Rajasthan*, which were cited to show that the decision in *Dinesh Chandra Sangma* had been followed. We have considered the aforesaid decisions and we find that it would depend upon the scheme of the Rules. Each and every judgment has to be considered in the light of the provisions which came up for consideration and question it has decided, language employed in the Rules, and it cannot be said to be of general application as already observed by this Court in *State of Haryana*.

43. It was also contended that the State of Uttar Pradesh may amend rules, in our opinion there is no such necessity in view of the Explanation the State has already amended its Rules so as to enable it to pass an order with respect to retirement whether it is at the instance of the Government or at the instance of the employee for both the public interest is germane.

(emphasis supplied)

7. A bare perusal of the aforesaid dictum of the Supreme Court itself reveals that it was passed while considering the provisions of Rule 56 of the Fundamental Rules as amended in the State of Uttar Pradesh and in fact the distinction is drawn by the Supreme Court itself by observing in para 8 that, *'the same (Rule 56) is somewhat different from the rules framed in other States'*.

8. The various decisions of this court relied upon by the counsel for the petitioner have been distinguished by the writ court in the following manner:-

“6. Mr. L C Patne learned counsel appearing for the petitioner

has placed strong reliance over the judgments passed by this Court in the case of Ruksana Begum Siddiqui vs. State of M.P & others reported in 2009 (5) MPHT 74; Dr.Ashish Kumar Pal vs. State of M.P & others (W.P.No.4127/2014 decided on 14.10.2014); Dr.Nagion Chandra Jain vs. State of M.P & others (W.P No.8484/2014 decided on 21.11.2014) & Dr. Bharat Singh Chauhan vs. State of M.P & others (W.P.No.6549/2015 decided on 22.9.2015) in which the similar controversy has been resolved by considering the provisions of section 42 (1)(a) of the Rules of 1976 which does not require corresponding acceptance of appointing authority and it a unilateral act of the government servant to quit the Government service at his will after rendering the minimum service.

7. After the aforesaid verdict given by this court, a similar issue about voluntary retirement application submitted by the doctors in the State of UP came up before the Apex Court in the case of State of Uttar Pradesh and others vs. Achal Singh reported in (2018) 17 SCC 578 in which the Apex Court has held that the concept of public interest can also be invoked by the Government when the voluntary retirement sought by the employee would be against the public interest because there is already paucity of doctors and the system cannot be left without competent senior persons, secondly the poorest of poor obtains treatment at the Government hospitals and thirdly where the right of public is involved in???? obtaining treatment the State Government can take a decision to decline the prayer for voluntary retirement, hence it cannot be said that the State has committed an illegality or the decision suffers from any vice or arbitrariness. The Apex Court has also observed that in the State of Tamil Nadu the Government has amended the rules not to retire Government doctors if there is any scarcity of doctors and it is open for the Government of Uttar Pradesh to amend its rules.”

(emphasis supplied)

9. So far as the parity drawn by the writ court in the impugned order regarding Fundamental Rule 56 of UP and Rule 42 of the Rule of 1976 is concerned, the same reads as under:-

Rule 56 of the Fundamental Rules as amended in the State of U.P.	Rule 42 of the M.P. Civil Services (Pension) Rules, 1976
“56.(a) Except as otherwise provided in this Rule, every Government servant other than a Government servant in inferior service shall retire from service on the afternoon of the last day of the month in which he attains the age of fifty eight years. He may be retained in service after the date of compulsory retirement with the sanction of the Government on public grounds which must be recorded in writing, but he must not	[42. Retirement on completion of 2[20/25 years] qualifying service:- [(1)(a) Government servant may retire at any time after completing 20 years qualifying service, by giving a notice in form 28 to the appointing authority at least one month before the date on which he wishes to retire or on payment by him of pay and allowances for the period of one month or for the period by which the notice actually given by him falls short of

<p>be retained after the age of 60 years except in very special circumstances.</p> <p>(b) A Government servant in inferior service shall retire from service on the afternoon of the last day of the month in which he attains the age of sixty years. He must not be retained in service after that date, except in very special circumstances and with sanction of the Government.</p> <p>(c) Notwithstanding anything contained in clause (a) or clause (b), the appointing authority may, at any time by notice to any Government servant (whether permanent or temporary) without assigning any reason, require him to retire after he attains the age of fifty years or such Government servant may by notice to the appointing authority voluntarily retire at any time after attaining the age of forty five years or after he has completed qualifying service of twenty years.</p> <p>(d) the period of such notice shall be three months:</p> <p>Provided that-</p> <p>i) any such Government servant may by order of the appointing authority, without such notice or by a shorter notice, be retired forthwith at any time after attaining the age of fifty years, and on such retirement the Government servant shall be entitled to claim a sum equivalent to the amount of his pay plus allowances, if any, for the period of the notice, or as the case may be, for the period by which such notice falls short of three months, at the same rates at which he was drawing immediately before this retirement;</p> <p>ii) it shall be open to the appointing authority to allow a Government servant to retire without any notice or by a shorter notice without requiring the Government servant to pay any penalty in lieu of notice:</p> <p>Provided further that such notice given by the Government servant against whom a disciplinary proceeding is pending or contemplated, shall be effective only if it is accepted by the appointing authority, provided</p>	<p>one month:</p> <p>Provided that this sub-rule shall not apply to the Government servants mentioned in brackets against each of the following Departments, until they have not completed 25 years qualifying service:-</p> <p>(a) Public Health & Family Welfare Department (Medical, Paramedical & Technical Staff);</p> <p>(b) Medical Education Department (Teaching Staff, Paramedical & Technical Staff):</p> <p>Provided further that such Government servant shall not be allowed to retire from service without prior permission in writing of the appointing authority under the following circumstances:-</p> <p>(i) Where the Government servant is under suspension:</p> <p>(ii) Where it is under consideration of the appointing authority to institute disciplinary action against the Government Servant:</p> <p>Provided also that if the appointing authority has not taken the decision under clause (ii) of the second proviso, within six months from the date of notice given by the Government servant with regard to such disciplinary action it shall be deemed that the appointing authority has allowed to such Government servant to retire from service on the date after expiry of the period of six months]</p> <p>(b) The appointing authority may in the public interest require a Government servant to retire from service at any time after he has completed 20 years qualifying whichever is earlier with the approval of the State Government by giving him three months notice in Form 29:</p>
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that in the case of a contemplated disciplinary proceeding the government servant shall be informed before the expiry of his notice that it has not been accepted.	
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10. It is apparent that the learned Single Judge has not quoted the Explanation as provided under 56 of UP Fundamental Rules which is also quoted by the Supreme Court in **Achal Singh's** (supra) case and which have also been reproduced herein above by this court.

11. In such circumstances, this court is of the considered opinion that the learned judge of the writ court was not right in holding that Rule 56 of UP is *in pari materia* with Rule 42 of Rules of 1976 and thus, the distinction as made by the learned judge in para 6 and 7 of its judgement as reproduced above also does not hold water and cannot be approved.

12. So far as the decision rendered in the case of **State of Madhya Pradesh vs. Dr. Harendra Jaseja reported in 2014 SCC OnLine MP 5940** is concerned, while considering the provisions of Rule 42, it has been held by the Division Bench of this court at Gwalior Bench, as under:-

“ In the opinion of this Court sustainability of impugned transfer order is required to be addressed only if the respondent could be said to be in service as Associate Professor while being transferred from Gwalior to Sagar. Respondent/Employee's application dated 6/8/2013 seeking voluntary retirement with one month notice was after having qualifying 25 years of service and therefore the respondent was well within his rights to seek voluntary retirement immediately after expiry of one month period as indicated in the prescribed notice dated 6/8/2013. Undisputedly, respondent is not under suspension. Further, there is nothing on record to suggest that any matter was under consideration before the appointing authority to institute disciplinary action against the respondent, therefore, no permission was required to accord sanction for voluntary retirement. Hence, under such circumstances, the voluntary retirement has come in existence immediately after expiry of one month period w.e.f. 5/9/2013. There was no employer-employee relationship between the appellants/State and

respondent/employee. Appellants/State lacked authority while issuing the impugned transfer order. Learned Single Judge has elaborately explained the legal position as regard the consequence flowing from the application submitted by respondent/employee seeking voluntary retirement and reached to the conclusion that after expiry of one month notice period, the employer-employee relationship ceases and therefore no transfer order could be issued.

As such, no illegality is found in the order passed by learned Single Judge.

Appeal is hereby dismissed as bereft of merits.”

(emphasis supplied)

13. The Special Leave to Appeal filed against the aforesaid decision has also been dismissed by the Supreme Court in SLA No.6424/2015 on 13.04.2015, a copy of which is also placed on record.

14. In view of the same, the judgments passed by this Court and relied upon by the counsel for the petitioner in the case of **Ruksana Begum Siddiqui vs. State of M.P & others reported in 2009 (5) MPHT 74; Dr. Ashish Kumar Pal vs. State of M.P & others (W.P.No.4127/2014 decided on 14.10.2014); Dr.Nagion Chandra Jain vs. State of M.P & others (W.P No.8484/2014 decided on 21.11.2014) & Dr. Bharat Singh Chauhan vs. State of M.P & others (W.P.No.6549/2015 decided on 22.9.2015) which have been distinguished by the writ court in the impugned judgement are held to be good and still holding the field, in which the similar controversy has been resolved by considering the provisions of Rule 42 (1)(a) of the Rules of 1976 which does not require corresponding acceptance of appointing authority as it is a unilateral act of the government servant to quit the Government service at his will after rendering the minimum service.**

15. Resultantly, the appeal stands **allowed** and the impugned order dated 8.7.2021 (Annexure A/3) passed by the learned Single Judge of this Court in W.P. No.13815/2021 is hereby set aside. Resultantly, the impugned order dated 09.09.2020 (Annexure P/6) passed by the respondent no.1 is hereby quashed and the respondents are directed to

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to release all the retiral dues such as pension, gratuity, leave encashment, Family Benefit Fund, Group Insurance Scheme, GPF, etc. by treating the petitioner/appellant retired from the post of Insurance Medical Officer from the services of respondent No.1/Department w.e.f. 01.3.2020 with all consequential and monetary benefits along with Bank interest rates.

**(Subodh Abhyankar)
JUDGE**

**(Satyendra Kumar Singh)
JUDGE**

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THE HIGH COURT OF MADHYA PRADESH, INDORE BENCH

Writ Appeal No. 620/2021

(Dr. Durgesh Rathi vs. State of Madhya Pradesh and another)

Indore, Dated: 04.02.2022

Shri L.C. Patne, learned counsel for the appellant.

Shri Aditya Garg, learned Government Advocate for the respondent/State.

Arguments heard.

Reserved for judgment.

(Subodh Abhyankar)
JUDGE

(Satyendra Kumar Singh)
JUDGE

Indore, Dated: 23.03.2022

Judgment delivered, signed and dated.

(Subodh Abhyankar)
JUDGE

(Satyendra Kumar Singh)
JUDGE

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Division Bench : Hon'ble Shri Justice Subodh Abhyankar
Hon'ble Shri Justice Satyendra Kumar Singh
Writ Appeal Case No.620/2021

1	Case No.	W.A.No.620 of 2021
2	Parties Name	Dr.Durgesh Rathi vs. State of M.P.
3	Date of Judgment	23rd of March, 2022
4	Bench constituted of Hon'ble Justice	<u>Division Bench</u> Hon'ble Shri Justice Subodh Abhyankar Hon'ble Shri Justice Satyendra Kumar Singh
5	Judgment passed by	Hon'ble Shri Justice Subodh Abhyankar
6	Whether approved for reporting	Yes
7	Name of counsel for the parties	Shri L.C. Patne, learned counsel for the applicants. Shri Aditya Garg, learned Govt. Advocate for the respondent/State.
8	Law laid down	<u>Rule 42(1)(a) of the M.P Civil Services (Pension) Rules, 1976. Notice of Voluntarily retirement does not require corresponding acceptance of appointing authority.</u> State of Madhya Pradesh vs. Dr.Harendra Jaseja reported in 2014 SCC OnLine MP 5940; Ruksana Begum Siddiqui vs. State of M.P & others reported in 2009 (5) MPHT 74; Dr.Ashish Kumar Pal vs. State of M.P & others (W.P.No.4127/2014 decided on 14.10.2014); Dr.Nagion Chandra Jain vs. State of M.P & others (W.P No.8484/2014 decided on 21.11.2014) & Dr. Bharat Singh Chauhan vs. State of M.P & others (W.P.No.6549/2015 decided on 22.9.2015) which have been distinguished by the writ court in the impugned judgement are held to be good and still holding the field, in which the similar controversy has been resolved by considering the provisions of Rule 42 (1)(a) of the Rules of 1976 which does not require corresponding acceptance of appointing authority as it is a unilateral act of the government servant to quit the Government service at his will after rendering the minimum service. Relied upon: Dr. Duresh Rathi vs. State of Madhya Pradesh & others (W.A.No.247 of 2021 dated 17.6.2021) <u>Distinguished: State of Uttar Pradesh & others vs. Achal Singh</u> held, is distinguishable and has no bearing on Rule 42 of M.P. Rules.
9	Significant para	10 to 14

(Subodh Abhyankar)
Judge